

The availability of public funding for legal representation at Inquests

Introduction

Are policy-makers and practitioners in the field in a better position to prevent deaths in custody if families are represented at inquests? This question must necessarily lie at the heart of the Forum's interest in this subject. This paper begins by setting out the current legal aid regime, before going on to consider the wider issues.

Public funding: the legal framework

The Legal Services Commission (LSC) is the body charged with regulation and decision-making in the provision of legal aid in the first instance. Funding is provided either as part of the Criminal Defence Service or Community Legal Service -- the latter is relevant for present purposes -- within the framework of the Access to Justice Act 1999.

This Act empowers the Lord Chancellor to instruct the LSC to fund categories of case which would normally be excluded, or to fund such cases in specified circumstances, or to fund individual cases. This is known as 'exceptional funding'. While the LSC are themselves the decision-maker for cases which are within the scope of public funding, the Lord Chancellor is the decision-maker (on receipt of a recommendation from the LSC) in 'exceptional funding' cases.

Inquests

Schedule 2 of the 1999 Act provides that *advocacy services* before the coroner are excluded from the usual scope of public funding. However, *Legal Help* for other types of service (such as those entailed in the preparation for the inquest) is not specifically excluded. Because of this, applicants who wish to obtain both legal advice in the run-up to the inquest and advocacy services at the inquest itself must therefore go through two different processes.

Advocacy Services

The Lord Chancellor's Authorisation on Inquest Funding

As well as the general 'exceptional funding' route for individual cases already noted, certain *categories* of inquests have been brought within the scope of public funding by a Lord Chancellor's Authorisation in 2001.

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The Lord Chancellor has authorised the Commission to fund *advocacy services* to the *immediate family* of the deceased where the death took place:

- (i) in prison or police custody;
- (ii) during the course of police arrest, search, pursuit or shooting;
- (iii) during the compulsory detention of the deceased under the Mental Health Act 1983

In addition, the Commission must be satisfied that funded representation is 'necessary to assist the Coroner to investigate the case effectively and establish the facts'. The Lord Chancellor further instructs the LSC to have regard to the same Guidance in their decision-making as he has issued for the exceptional funding of individual cases.

Clearly, the scope of the 2001 Authorisation does not extend to deaths in other custodial settings (e.g. Secure Training Centres or Immigration Detention Centres), even though such deaths engage Article 2 and may give rise to learning opportunities, either within the custodial sector in which they took place or more widely.

The two routes for obtaining funding for advocacy services

For cases falling within the scope of the 2001 Authorisation, there are thus two ways in which public funding for advocacy services can be obtained:

1. By persuading the LSC to make a recommendation to the Lord Chancellor that an individual case should be 'exceptionally' funded (assuming the Lord Chancellor accepts that recommendation), or
2. By satisfying the LSC that the inquest is within one of the specified categories of inquest covered by the Lord Chancellor's Authorisation, and that funding is necessary (having regard to the Lord Chancellor's Guidance on the subject)

As seen, the 2001 Authorisation has no application in respect of certain categories of custodial death. In such cases, the exceptional funding route is the only option for families.

The Lord Chancellor's Guidance

At its most general, there are two alternative grounds for providing funding, of which the Commission must satisfy the Lord Chancellor (for exceptional funding) or be satisfied itself (for funding under the 2001 Authorisation).

These are:

- (i) That the case is of significant wider public interest, or
- (ii) That funded representation for the family is likely to be necessary to enable the Coroner to carry out an effective (Article

2-compliant) investigation into the death (family here is to be interpreted broadly).

The Guidance goes on to set out what this means in practice.

(i) 'Significant wider public interest'

The Guidance provides that this is only likely to be deemed to be the case '...where the proceedings have the potential to produce real benefits for members of the public other than the client and their family.' Even where this is true, the applicant has the burden of demonstrating that *representation* is likely to be necessary for those benefits to be realised, not merely that the inquest in itself might produce such benefits.

(ii) Representation is necessary for Article 2-compliance

Here, the Guidance calls for the Commission to look to the case of *R (on the application of Khan) v Secretary of State for Health* [2003] EWCA Civ 1129. Khan recognises that the inquest is the natural juncture for the state's investigative obligation under Article 2 to be discharged. The Court accepted that an inquest could not be compliant if the family of the deceased did not have the opportunity to play an effective part in it, but went on to say that the Coroner could, '...in the overwhelming majority of cases...', conduct an effective inquiry himself, without the need for family representation. Only exceptional cases would require the family to be represented to comply with Article 2.

In deciding whether a case is sufficiently 'exceptional' in this sense to justify funding, the Commission must take into account:

1. The nature and seriousness of any allegations likely to be aired at the inquest (in particular, those against public bodies). Other relevant factors are closely related avoidable deaths within the same institution; criminal conduct; any attempts to interfere with an investigation of the death.
2. What investigations have taken (or will take) place, and the extent of family participation in those investigations
3. Whether the family are likely to be able to participate effectively in the inquest without representation (this will depend on the nature of the issues and the family's circumstances)
4. Any views on funded representation expressed by the Coroner (these are relevant but not determinative)

In terms of the degree of family participation likely to be possible *without* representation, the Guidance states that 'in general, the ability to attend and to understand the proceedings, together with an opportunity to raise any

particular matters of concern with the Coroner, would be sufficient to ensure participation.'

While applicants must usually satisfy the financial eligibility criteria set out in the funding code, the LSC has a discretion to waive the criteria in respect of in-scope inquests and the Lord Chancellor has the same discretion in respect of out-of-scope inquests. This discretion will be exercised '...if, in all the circumstances, it would not be reasonable to expect the family to bear the full costs of representation at the inquest.' Whether or not this is reasonable '...will depend in particular on the history of the case and the nature of the allegations to be raised, the applicant's assessed disposable income and capital, other financial resources of the family, and the estimated costs of providing representation.'

Legal Help

As already noted, it is only advocacy at most inquest proceedings that is excluded from funding. Other forms of legal assistance, such as advice and preparation for the inquest, are not specifically excluded, and do not need to be the subject of an application under one of the two routes outlined in the previous section. Instead, the usual rules will apply (including those on financial eligibility), though in exceptional funding cases only, there is a discretion to waive the usual criteria where preparatory work is unusually high, and to include it instead as part of the exceptional funding application.

The problems of the existing system

1. Legal Help vs Advocacy services

The fact that two different processes exist for obtaining funding under these different heads is potentially problematic: it is possible that a family member may succeed in obtaining advice and assistance with preparation up until the point of the inquest, but might then find themselves unrepresented for the hearing itself. Indeed, this has happened in death in custody inquests in the past.

2. Article 2, the right to life and learning lessons

Article 2 requires next-of-kin to be able to participate in proceedings '...to the extent necessary to safeguard his or her legitimate interests' (*Jordan v UK* (2003) 37 EHRR 52). This requirement might not be met in circumstances in which the family initially wished to participate, but were then dissuaded by an anxious, time-consuming and intrusive funding application process which carried no ultimate guarantee of success.

More importantly from a lessons-learning perspective, there is some anecdotal evidence that not all relevant issues may be aired or explored as

thoroughly where a family are left to represent themselves. INQUEST are of the view that '...there are custodial deaths that have not been properly scrutinised because families did not have information and the resources to be legally represented.'¹ Lawyers experienced in representing families appear broadly to concur with this view: notwithstanding familiar arguments about inquests being inquisitorial rather than adversarial processes, one barrister suggests that '...lawyers representing the family often do so in isolation, in terms of the issues they seek to push to be explored at the inquest. More often, they have a single voice, whereas those representing other interested persons sing in unison together like a team effort.'²

3. Interpretation of the Guidance

The Lord Chancellor's Guidance calls for value judgement to be made on a number of factors before a decision to provide funding under the 2001 Authorisation, or to recommend funding for an out-of-scope inquest, can be made. Chiefly, these are judgements about the wider public interest (as defined in the Guidance) and about whether or not funded representation is likely to be necessary for the state to discharge its responsibilities under Article 2. Perhaps unsurprisingly, this has led to decisions which have been criticised as inconsistent across different LSC offices.

1. The wider public interest

As already noted, the terms of the 2001 Authorisation provide that there are two alternative grounds under which the LSC can fund cases brought into scope by the authorisation. The first of these is that funding must be in the significant wider public interest. The applicant must attempt to establish that that *representation* is likely to be necessary for public benefit to be realised, not merely that the inquest in itself might produce such benefits.

In this context, the Forum might be interested in the extent to which the criteria capture the objectives of learning lessons and reducing the likelihood of future deaths.

At present, the Funding Code Guidance on the meaning of 'significant wider public interest' (set out at Part C, para 5.3 of the Code) provides that a commonsense approach should be adopted. The more intangible or indirect a wider benefit is perceived to be, the harder it will be to justify funding. The Code suggests that "...'*public interest*' carries with it a sense that large numbers of people must be affected. As a general guideline, even where the benefits to others are substantial, it would be unusual to regard a case as having a significant wider public interest if fewer than 100 people would benefit from its outcome." However, the Code also notes that the nature of the

¹ *Unlocking the Truth: Families' Experiences of the Investigation of Deaths in Custody*, Shaw and Coles, 2007, p.90

² *Ibid*, p.95

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benefit is also relevant: where the benefit is significant (this presumably includes issues of life-and-death such as the identification and elimination of unsafe practices), it is conceivable that a smaller number of people may be affected but this could still be sufficient to make out the limb.

In the context of deaths in custody, these considerations seem somewhat esoteric and contrived, which is perhaps unsurprising given that this part of the Code was presumably not written with inquests into deaths in custody in mind. Given the unique inquisitorial nature of inquests, and the very specific considerations which inquests into custodial deaths involve, the Forum may consider that a separate set of criteria could be written into the part of the Code dealing with decision-making in funding inquests, rather than cross-referencing to guidance written for much more general purposes.

If criteria which are more specific to inquests were to be developed, it would be possible to tie those criteria much more firmly to the objective of lessons-learning. Such criteria could include:

- Whether lessons with wider application (either within the custodial sector in which the death took place or more widely) are likely to emerge
- Whether rule 43 recommendations are likely to be made, and if so, the representations likely to be made as to what rule 43 recommendations are appropriate. The Guidance could include the recommendation that the Coroner should be consulted on this point
- If rule 43 recommendations *are* likely, whether the agencies or bodies likely to receive a rule 43 recommendation will be legally represented at the inquest
- The likely *complexity* of any representations on possible rule 43 recommendations, and whether an unrepresented family are likely to be in an equal position to the other properly interested persons in terms of making submissions to the Coroner on this point
- Whether any lessons or rule 43 recommendations which are likely to be made have previously been made in inquests into deaths in similar circumstances (this would make representation for the family more likely if it appears that previously-identified lessons had not been learned. This would also fit into the amendments to rule 43 being laid in June 2008)

2. When is representation necessary to satisfy Article 2?

As already noted, the Guidance requires the LSC to have regard to the judgment in *Khan* and the following factors in reaching a decision as to whether Article 2 can be complied with without family representation:

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1. The nature and seriousness of any allegations likely to be aired at the inquest (in particular, those against public bodies).
2. What investigations have taken (or will take) place, and the extent of family participation in those investigations
3. Whether the family are likely to be able to participate effectively in the inquest without representation (this will depend on the nature of the issues and the family's circumstances)
4. Any views on funded representation expressed by the Coroner (these are relevant but not determinative)

In cases of deaths in custody, it is difficult to see how some of these factors assist in determining whether representation will be required for Article-2 compliance.

Conclusion

In *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, Lord Bingham suggested that the purposes of the additional Article 2 procedural obligations on the investigation and the inquest were as follows:

'...to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrong-doing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.'

It is these latter objectives which are most closely allied with the Forum's purpose. The key question for the Forum is whether, if families are unrepresented (or inadequately represented), the circumstances of the death may not receive the scrutiny which they otherwise would, with the result that acts or omissions which contributed to the death could happen again in the future. While it cannot be said in principle that the *Amin* objectives can never be achieved without legal representation for the family, it seems equally clear that appropriate representation for the family will often further them, and (as we have seen), lawyers and others working in the field have also argued that there are examples of cases where the lack of representation was certainly a hindrance to achieving them.

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